STATUS OF EXISTING RAILROAD LAWS AND REGULATIVE AGENCIES UNDER FEDERAL CONTROL

By Edgar Watkins

The regulation of railroads may for the purposes of this discussion be divided into two categories. These are, the regulations tending to promote competition among railroads and those prescribing a price to be paid for a service.

The orders of the Director General which in effect suspend the anti-pooling section of the Act to Regulate Commerce and the right of the railroads to protection against short hauling, which take from shippers their statutory right to route their freight and which limit the right of the carriers to make traffic agreements, fall in the first category and suspend statutes inconsistent with the full utilization by the government of the property taken over. These statutes may be considered as repealed for the time being by clear intendment of Congress. Accounting rules, the discharge of employes and the issuance of passes, within the terms of the law, are but incidents of possession and use, and freight embargoes are frequently enforced by railroads privately owned. Demurrage charges and regulations are not primarily intended to obtain revenue but to facilitate transportation by the prompt release of cars. If the demurrage charge is small a shipper may be slow to release his car, while a high rate of demurrage stimulates the expeditious loading and unloading of cars. It follows, therefore, that the Director General was effecting a greater utilization of "material and equipment" for "purposes connected with the emergency," when he obtained an increase of the demurrage rates.

What has been done was clearly authorized by the act of Congress under which the Director General was appointed, and he probably could have made effective the demurrage rules without the interposition of the Interstate Commerce Commission.

Similarly there could be no reasonable question of his authority to make rules and regulations as to methods of packing, loading and stowing shipments, and of otherwise protecting and conserving those commodities required by the exigencies of the present

situation. Thus he may say, as the Food Administrator has stated in advertisements, that flimsy boxes should not be used as containers for the transportation of food products. Passenger travel might be curtailed, because to do so would leave available more equipment for the transportation of commodities necessary to supply the public wants.

The provisions of sections 2 and 3 of the Act to Regulate Commerce, which prohibit discriminations and preferences, remain in force, except preferences may be given as stated in the act relied on by the President and quoted above. Similar but less liberal governmental preferences were given by the Hepburn amendment of June 29, 1906.

The shipper's right to a reasonable rate, to allowances for services and instrumentalities furnished, to reparation for damages suffered and to protection against an "increased rate, fare, charge or classification" until "after approval thereof has been secured from the commission," [1] are not inconsistent with the purposes for which the President was authorized to take possession of the railroads.

These rights of shippers to a fair equality among themselves, to reasonable charges, to allowances in proper cases and to freedom from rate increases without prior approval by the Interstate Commerce Commission are in the second category; and being entirely consistent with the purposes for which the President was authorized to seize the railroads still exist, and it seems clear that Congress has not as yet given the President power to issue all kinds of orders which "shall have paramount authority."

The shipper's rights are subordinate to the needs of the government in connection with the transportation of all persons and commodities used or necessary to the conduct of the war, and to the authority of the President to utilize the railroads for "such other purposes connected with the emergency (created by the war) as may be needful or desirable." "Needful" and "desirable" give the President a discretionery power of wide scope, but such power is the power of utilization of the railroads. If the utilization for the purposes named or for purposes connected with the present

[1] Act of August 9, 1917, amending sec. 15 of the Act to Regulate Commerce. It will be noted that this act was passed nearly a year after the approval of the act under which the director of railroads obtains his power: and that the President seized the roads under authority of a section of an appropriation act passed nearly eight months before Congress declared the existence of a state of war.

emergency and deemed needful or desirable exclude any shipper from the use of the railroads, the statutory power has not been exceeded. If, however, the shipper be not so excluded from such use, the use he receives, limited only by the governmental exigencies, must be on the terms prescribed in the acts to regulate commerce and not on different terms ordered by the Director General.

While the President gives "paramount authority" to the orders of the Director, he means of necessity orders authorized by the act of August 29, 1916, and not orders which would fix charges different from those found reasonable by the Interstate Commerce Commission.

Congress has under consideration bills fixing more definitely the powers to be exercised by the President. The authority to prescribe rates and to make regulations not directly affecting the utilization of equipment, may, in the discretion of Congress, be left with the several commissions; but it may well be argued that a tribunal like the Interstate Commerce Commission composed of nine men cannot act with that promptness demanded by the exigencies arising out of our participation in a great war.

The Interstate Commerce Commission exercises legislative, judicial and administrative functions. It also debates like a legislative body, and delays like judicial tribunals. Its administrative functions can best be left to one man; but its rate making, or legislative function, and its rate judging, or judicial function, will be, if retained, given greater consideration, although not necessarily with more correct conclusions, than if committed to any executive.

Rate making as between the private owner and the shipper is unquestionably a legislative act. There is force in the argument that since the government is the possessor and user of the railroads the charges to be exacted may be prescribed as mere administrative acts. This question is academic as the Congress is proposing legislation which it may lawfully enact, whether or not there exists a difference in power because of the ownership being private or public.

It is proposed in the pending legislation to specify where the authority to make rates shall lie. The argument is made that unless the power is given the Director General to take any action concerning either operation or charge that he may deem needful and proper, he will be unable effectually to meet the public exigency. By others the argument is pressed on the committees of Congress

that to give so great a power to one man is dangerous and that if Congress should give such jurisdiction to the Director General it would be shirking its constitutional obligations by delegating legislative powers.

Congress cannot delegate its legislative authority. It can, however, prescribe a general rule leaving to a delegated person or tribunal to determine when particular facts bring a rate, practice or regulation within the rule. This Congress did when it created the Interstate Commerce Commission, which, when first created, was but part of the Department of the Interior. That the Commission was composed first of five, later of seven and now of nine men, does not change the rule.

The number of men entrusted with power has no relevancy to the legal right to make the appointment of the agency, and one director general can be given all the powers that have been or may be given nine commissioners.

When different agencies have jurisdiction, however carefully delimited, over the same subject matter, there will of necessity arise unforseeen situations presenting questions, difficult of solution, as to which agency has authority. No general line of demarkation of separate authority can make provision for the infinite situations which may from time to time arise. In the present hour of supreme need for prompt and decisive action, there should be one agency with "paramount authority." The ordinary commissions may, in subordination to this agency, be utilized; and, when speed is not necessary, these commissions may be left to hear, discuss and recommend.